

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



75-2021

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA ex rel. :  
ROBERT W. LLOYD, :  
Petitioner-Appellee, :  
-against- :  
LEON J. VINCENT, Superintendent, :  
Green Haven Correctional Facility, :  
Respondent-Appellant. :  
-----X

BRIEF FOR APPELLANT

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Appellant  
Office & P.O. Address  
2 World Trade Center  
New York, New York 10047  
Tel. No. (212) 488-7410

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

BURTON HERMAN  
Assistant Attorney General  
of Counsel

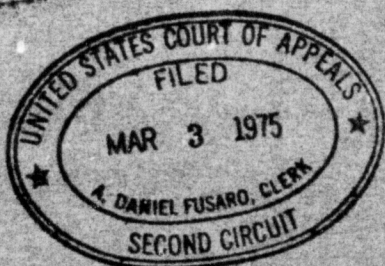


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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. ROBERT :  
W. LLOYD,

Petitioner-Appellee, :

- against - :

LEON J. VINCENT, Superintendent, Green :  
Haven Correctional Facility, :

Respondent-Appellant. :

-----X

BRIEF FOR APPELLANT

Statement

This is an appeal by the State from an order of the United States District Court for the Eastern District of New York (Mishler, J.) dated January 10, 1975 granting a petition for writ of habeas corpus, vacating a judgment of conviction in the Nassau County Court, and directing a new trial within 60 days or dismissal of the indictment. The District Judge ruled that appellee's right to a public trial was violated. On January 30, 1975 he granted appellant's motion to stay the order pending the determination of this appeal.



Question Presented

Was the appellee deprived of the right to a public trial?

Prior Proceedings

On October 19, 1973 at a term of the County Court, Nassau County (Lockman, J.) appellee was sentenced to state prison for two concurrent four year terms after being convicted of two counts of criminally selling a dangerous drug in the third degree by the verdict of a jury. The judgment of conviction was affirmed. 44 A D 2d 912. Leave to appeal to the New York Court of Appeals was denied.

The People's first two witnesses were undercover agents from the Narcotics Squad of the Nassau County Police Department and they were still engaged in undercover work in Nassau County areas (86; 338-339; 345-346).<sup>\*</sup> The prosecutor sought to protect the identity of these agents (38) and made an application to close the court to spectators (86; 547) on the ground of the confidentiality of the two agents (88).

<sup>\*</sup>Unless otherwise indicated numerals in parenthesis refer to the minutes of trial.

Defense counsel opposed the application. At the time of the motion only one spectator was present, and defense counsel did not have in mind any particular person who he wanted in the courtroom. His opposition was based solely on the contention that an accused has a right to have the public walk in and out during the trial. See the colloquy between the trial judge and defense counsel:

"The Court: In other words, you don't have any particular person you want in the courtroom, do you? You just want the public to be allowed to walk in and out when the undercover people testify? That's your position?

Mr. Schutzman: Yes. I want the absolute right to a public trial."  
(89).

The application of the People was granted. In deciding the motion the court took into account the confidentiality of the undercover agents, the danger to their lives and the continuing investigation that they were undertaking.  
(94).



ARGUMENT

UNDER THE CIRCUMSTANCES OF THE  
CASE APPELLEE WAS NOT DEPRIVED  
OF THE RIGHT TO A PUBLIC TRIAL.

Neither defense counsel nor his client had in mind any particular person whom they wanted present in the courtroom, and counsel's opposition to the exclusion order was based solely on the contention that an accused has an absolute right to have the public walk in and out during the trial. This Court has refused to recognize the existence of such a right. See United States ex rel. Bruno v. Herold, 408 F 2d 125 (2d Cir. 1969), cert. denied 397 U.S. 957, which held that exclusion of spectators per se is not a deprivation of the right to a public trial. The fact that in Bruno supra, some outsiders happened to be present was not essential to the decision. As the Court stated (p. 127):

"Surely there is no constitutional  
right to the presence of all public  
spectators who might desire to be  
present..."

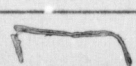
See also Lacaze v. United States, 391 F 2d 516, 521 (5th Cir. 1968); United States ex rel. Orlando v. Fay, 350 F 2d 967, 970

(2d Cir. 1965), cert. denied Orlando v. Follette, 384 U.S. 1008 (The state trial court excluded all spectators except members of the bar and press and the record did not disclose whether representatives of these groups sought admittance).

The two undercover agents were black officers who were investigating black areas in Nassau County and there is great mobility between these areas. Record on Appeal in Matter of Hool, Jr. unreported (2d Dept., February 4, 1974). Their mere appearance in court as witnesses against appellee who was accused of dealing in narcotics created a risk of exposure of their identities to actual or potential targets of their active investigations. Shielding the identity of a police witness, preserving his future usefulness, and safeguarding his life has been recognized as an adequate reason for an exclusion order.\* People v. Hinton, 31 N Y 2d 71, 75, (1972) cert. den. 410 U.S. 911; People v. Pacuicca, 134 N.Y.S.2d 381, aff'd 286 A.D.996.

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\*In Hinton, supra the fact that targets of the agent's other investigations were present in the courtroom was not essential to the decision. The court described this fact as merely an "added factor," and noted that "The exact circumstances as in the instant case" were present in Pacuicca supra (where targets of other narcotics investigations were not said to be present in the courtroom).





The District Judge apparently recognized the validity of the reason asserted in justification of the exclusion order, but he ruled that the state court erred in "failing to require a showing that the agents' confidentiality would be jeopardized or that their lives would in fact be endangered." (Appendix pp. 43-44). No showing was necessary. See People v. Hinton, supra, People v. Pacuicca, supra. The officers believed that their lives would be endangered and their belief was obvious to the state judge. People v. Hagen, 24 N Y 2d 395 (1969), cert. denied 396 U.S. 886; United States ex rel. Bruno v. Herold, supra.

Even if there was error in excluding the public during the testimony of the undercover agents it does not rise to constitutional dimension. The testimony of the agents constituted only a part of the prosecution's case. Appellee and defense counsel were present throughout and counsel was permitted complete opportunity to object to the testimony and cross-examine the witnesses. The public was not excluded during Lloyd's testimony in his own behalf. Indeed, at least one spectator was present when he took the stand (457). The public was not barred during the testimony of the two other witnesses in appellee's favor, nor was it barred during the summations and remainder of the trial. The exclusion order

did not prevent appellee from defending against the charge in an open courtroom. Under the circumstances of the case the proceeding was in effect a public trial. See Levine v. United States, 362 U.S. 610, 616-620 (1960); Stamicarbon, N.V. v. American Cyanamid Company, 506 F.2d 532, 541, n. 14 (2d Cir. 1974).

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE  
REVERSED.

Dated: New York, New York  
February 28, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Appellant

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

BURTON HERMAN  
Assistant Attorney General  
of Counsel



STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK )

ANNA M. VELEZ , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellant herein. on the 3rd day of March, 1975, she served the annexed upon the following named person :

EUGENE MURPHY, ESQ.  
James J. McDonough, Esq.  
Legal Aid Society of Nassau  
400 County Seat Drive  
Mineola, New York 11501

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Sworn to before me this  
3rd day of March, , 1975

Burtan Kerman  
Assistant Attorney General  
of the State of New York